STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH MARKIEWICZ and CAROL MARKIEWICZ,

Plaintiffs-Appellants,

v

ALLEN MARKIEWICZ,

Defendant-Appellee.

UNPUBLISHED
September 18, 1998

No. 208523
Macomb Circuit Court
LC No. 97-005609 DC

Before: Corrigan, C.J., and MacKenzie and R. P. Griffin*, JJ.

PER CURIAM.

Plaintiffs appeal by right the order granting summary disposition for defendant under MCR 2.116(C)(5) in this custody dispute. We affirm and dissolve the stay.

Plaintiffs are the paternal grandparents of the five-year-old child, Ciera. Their son, defendant Allen Markiewicz, and Ciera's mother were never married. A Virginia court awarded custody to defendant shortly before Ciera's third birthday. Defendant thereafter allowed plaintiffs to take physical custody of the child. He executed a power of attorney in favor of plaintiffs to act in loco parentis that, by its terms, would expire on April 8, 1998, "UNLESS SOONER REVOKED OR TERMINATED BY [defendant]." On October 21, 1997, defendant revoked the power of attorney. Plaintiffs then commenced this action for custody. Defendant subsequently moved for summary disposition on the ground that plaintiffs lacked standing to seek custody. The trial court granted defendant's motion, but stayed enforcement of its order pending this appeal.

I

Plaintiffs argue that the trial court erred in granting summary disposition for defendant under MCR 2.116(C)(5) because they had standing under the Uniform Child Custody Jurisdiction Act ("UCCJA"), MCL 600.651 *et seq.;* MSA 27A.651 *et seq.*, and the Child Custody Act of 1970, MCL 722.21 *et seq.;* MSA 25.312(1) *et seq.*, to seek custody of their granddaughter. We disagree.

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

This Court reviews de novo a trial court's decision to grant summary disposition. *Wortelboer v Benzie Co*, 212 Mich App 208, 213; 537 NW2d 603 (1995). When deciding a motion under MCR 2.116(C)(5), the court considers the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). This Court reviews the entire record to determine whether the defendant is entitled to judgment as a matter of law. *Dep't of Social Services v Baayoun*, 204 Mich App 170,173; 514 NW2d 522 (1994).

Section 6c of the Child Custody Act, MCL 722.26c(1); MSA 25.312(6c)(1), governs the standing of third persons, other than full or limited guardians, to seek custody.[1] See MCL 722.26b; MSA 25.312(6b) (granting standing to guardians and limited guardians). Under the statute, a third person may bring an action for custody if either (1) the child was placed with the third person for adoption and has resided with him for six months, or (2) all of the following circumstances exist:

> (*i*) The child's biological parents have never been married to one another.
>
> (*ii*) The child's parent who has custody of the child dies or is missing and the other parent has not been granted legal custody under court order.
>
> (*iii*) The third person is related to the child within the fifth degree by marriage, blood, or adoption. [MCL 722.26c(1)(b); MSA 25.312(6c)(1)(b).]

Plaintiffs concede that the statute does not apply in this case because their son is alive and his whereabouts known, but argue that they have standing nonetheless under the UCCJA and § 7(1) of the Child Custody Act, MCL 722.27(1); MSA 25.312(7)(1).

We reject plaintiff's argument that the UCCJA, when combined with § 7(1) of the Child Custody Act, confers standing on third parties. The UCCJA governs interstate enforcement of custody orders. *Loyd v Loyd*, 182 Mich App 769, 774; 452 NW2d 910 (1990). It is a procedural statute that does not affect the substantive standards applied by the courts to determine custody. *In re Clausen*, 442 Mich 648, 675-676; 502 NW2d 649 (1993). Likewise, other than § 6b and § 6c, "the Child Custody Act involves procedure only and does not confer substantive rights of entitlement to custody of a child." *Sirovey v Campbell*, 223 Mich App 59, 71; 565 NW2d 857 (1997); see also *Bowie v Arder*, 441 Mich 23, 43; 490 NW2d 568 (1992).

In *Sirovey*, *supra* at 71, this Court held that § 7(1) of the Child Custody Act does not confer standing on third parties. The statute provides that where a "custody dispute . . . has arisen from another action in the circuit court or an order of judgment of the circuit court," the court may enter custody decrees if in the best interests of the child. MCL 722.27(1); MSA 25.312(7)(1). The Virginia custody decree involved in this case is not an action that gives rise to incidental application of § 7(1). See *Clausen*, *supra* at 682-683; *Sirovey*, *supra* at 71-75. In *Ruppel v Lesner*, 421 Mich 559, 565-566; 364 NW2d 665 (1984), the Michigan Supreme Court explained:

> The Child Custody Act does not create substantive rights of entitlement to custody of a child. Rather, it creates presumptions and standards by which competing

> claims to the right of custody are to be judged, sets forth procedures to be followed in litigation regarding such claims, and authorizes the forms of relief available in the circuit court. *While custody may be awarded to grandparents or other third parties according to the best interests of the child in the appropriate case (typically involving divorce), nothing in the Child Custody Act, nor in any other authority of which we are aware, authorizes a nonparent to create a child custody "dispute" by simply filing a complaint in the circuit court alleging that giving custody to the third party is in the "best interests of the child."* When, as in this case, the third parties are close relatives of the child, we must remember that, except for limited visitation rights, grandparents have no greater claim to custody than any other relative, or indeed any other persons. [Emphasis added.]

Nine years later, our Supreme Court squarely addressed and rejected plaintiffs' argument that, even though they are not entitled to bring an action for custody, the Child Custody Act standards may incidentally apply to their action because they did not create the custody dispute and seek only to modify another state's custody award. *Clausen, supra* at 682-683. Accordingly, we conclude that plaintiffs do not have standing under the UCCJA and Child Custody Act of 1970 to seek custody of Ciera.

Plaintiffs further argue that they have standing because of their equitable interest in the subject matter of this dispute. Plaintiffs, however, failed to preserve this issue by raising it below. *Brown v Michigan Bell Telephone, Inc (On Remand)*, 225 Mich App 617, 626; 572 NW2d 33 (1997). We decline to address this unpreserved argument. Therefore, the trial court properly granted summary disposition for defendant because plaintiffs lack standing to seek custody. In light of our decision, we dissolve the stay entered by the trial court.

II

Finally, defendant urges this Court to impose sanctions against plaintiffs under MCR 7.216(C)(1) for pursuing a vexatious appeal. Under MCR 7.216(C)(1)(a), a vexatious appeal is one "taken for purposes of hindrance or delay or without any reasonable basis for belief that there is a meritorious issue to be determined on appeal." Here, we note that the trial court, by staying its order pending appeal, expressed its belief that this appeal was not vexatious. We agree. Plaintiffs' arguments were not so lacking in merit that this appeal can be characterized as vexatious. Therefore, we decline to impose sanctions.

Affirmed. The stay is dissolved.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Robert P. Griffin

[1] Plaintiffs argued for the first time at oral argument that they had standing to seek custody under *Prawdzik v Hiner*, 183 Mich App 245; 454 NW2d 399 (1990), because Ciera resided with them. Plaintiffs' reliance on *Prawdzik* is misplaced. In *Prawdzik*, *supra* at 248-249, this Court framed the question in custody actions brought by third parties as one of subject matter jurisdiction and interpreted *Ruppel v Lesner*, 421 Mich 559; 364 NW2d 665 (1984), as creating an exception to the general rule of no jurisdiction for cases initiated by a third party who has had physical custody of the child. The Michigan Supreme Court, however, eventually rejected the *Prawdzik* interpretation of *Ruppel*. *Bowie v Arder*, 441 Mich 23; 490 NW2d 568 (1992). In *Bowie*, *supra* at 40-49, the Court explained that, while the circuit court has subject matter jurisdiction over such actions, the court errs in exercising jurisdiction when the third party does not have standing to seek custody. The Court then held that a third party does not attain a legal right to custody on the basis of the fact that the child resides with him. *Id.* at 45 & 49.